

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

In re MASSEY ENERGY CO.)	Civil Action No. 5:10-cv-00689
SECURITIES LITIGATION)	
)	<u>CLASS ACTION</u>
)	
This Document Relates To:)	The Honorable Irene C. Berger
)	
ALL ACTIONS.)	
)	

PLAINTIFFS' CLARIFICATION
IN RESPONSE TO THE ORDER DATED MARCH 9, 2012

Lead Plaintiff Commonwealth of Massachusetts Pension Reserves Investment Trust and Plaintiff David Wagner, on behalf of the Class (collectively, "Plaintiffs"), respectfully submit the following clarification in response to the Court's Order dated March 9, 2012 (the "Order"). The Order requires Plaintiffs, to the extent Plaintiffs assert they have moved to amend their pleading pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, to provide the Court with a copy of such a motion to amend together with the proposed amended pleading no later than Monday, March 12, 2012.

Plaintiffs respectfully clarify that the three Supplemental Proffers¹ were not intended to serve as motions to amend the Consolidated Amended Complaint (the "Complaint"). Because

¹ The three Supplemental Proffers previously submitted by Plaintiffs to the Court are as follows: (1) the "First Proffer," which was filed on June 9, 2011 as Exhibit C to the Declaration of Joel H. Bernstein (Dkt. No. 104-3) in support of Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss ("Plaintiffs' Opposition" (Dkt. No. 103)), which contained the initial conditional request to replead the Complaint, if necessary, at 49, n.66; (2) Plaintiffs' Supplemental Proffer of Additional Allegations Supporting Plaintiffs' Request for Leave to Replead the Consolidated Amended Complaint, if Necessary (the "Supplemental Proffer" (Dkt. No. 122)), which was filed on July 13, 2011; and (3) Plaintiffs' Third Proffer of Additional Allegations Supporting Plaintiffs' Request for Leave to

Plaintiffs believe their existing Complaint is sufficient, they did not file such a motion and contend that Rule 15(a) does not require such a contemporaneous filing under these circumstances. Rather, Plaintiffs sought to provide the Court with additional facts that were learned of *after* the filing of the Complaint, to “preview what additional facts or legal claims might be included in a second amended complaint (should one be allowed),” *Aponte-Torres v. University of Puerto Rico*, 445 F.3d 50, 58 (1st Cir. 2006). This was for the sole purpose of showing that if the Court were inclined to grant Defendants’ Motions to Dismiss the Complaint, amendment would not be futile and therefore, dismissal should not be with prejudice to Plaintiffs’ filing a motion to amend the Complaint under Rule 15(a).²

Dated: March 12, 2011

Respectfully submitted,

/s/ Joel H. Bernstein

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Replead the Consolidated Amended Complaint, if Necessary (the “Third Proffer” (Dkt. No. 130)), which was filed on December 22, 2011.

² See Plaintiffs’ Opposition at 49, n.66.

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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DATED: March 12, 2012

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